

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

VILLAGE OF BIG LAKE, MISSOURI

APPELLANT,

**v.
BNSF RAILWAY COMPANY, INC.
AND MASSMAN CONSTRUCTION CO.**

RESPONDENTS.

DOCKET NUMBER WD77016

DATE: June 3, 2014

Appeal From:

Holt County Circuit Court
The Honorable Roger M. Prokes, Judge

Appellate Judges:

Division Three: Thomas H. Newton, Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge

Attorneys:

Alexander L. Edelman and Katherine E. Myers, Kansas City, MO, for appellant.

Douglas R. Dalgleish, Kansas City, MO, for respondent BNSF Railway.
Scott W. Ross, Maryville, MO, for respondent Massman Construction.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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APPELLANT,

v.

**BNSF RAILWAY COMPANY, INC.
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RESPONDENTS.

No. WD77016

Holt County

Before Division Three: Thomas H. Newton, Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge

Village of Big Lake, Missouri appeals from the trial court's grant of summary judgment in favor of BNSF Railway Company, Inc. and Massman Construction Co. The Respondents claimed that language in permit agreements between Big Lake and BNSF's predecessor, Burlington Northern Railroad, released Big Lake's claims for negligence and trespass relating to damage to Big Lake's underground water lines and a fire hydrant. Because genuine issues of material fact as to which Respondents bear the burden of proof and persuasion remain in dispute, the entry of summary judgment is precluded as a matter of law.

Reverse and remand to the trial court for further proceedings.

Division Three holds:

1. Release language in a permit agreement did not expressly specify that Big Lake agreed to waive future claims of negligence, and thus was plainly unenforceable for that purpose barring an applicable exception to the general rule.
2. Respondents bore the burden of proof and persuasion on their affirmative defense of release. Because the release by its plain terms failed to comport with settled law with respect to the release of future claims of negligence, Respondent bore the burden of proving that the release fell within an established exception for contracts negotiated between sophisticated parties experienced in that type of transaction.
3. Whether parties to a contract are sophisticated is a question of fact.
4. Respondents' motion for summary judgment did not allege any uncontroverted facts which would have permitted the trial court to conclude as a matter of law that the permit agreements had been negotiated between sophisticated parties experienced in that type of transaction.

Opinion by Cynthia L. Martin, Judge

June 3, 2014

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